WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES September 2004

This calendar contains cases that originated in the following counties:
Dane
Kenosha
Milwaukee
Sauk
Sawyer
Walworth
Waukesha

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol.

THURSDAY, SEPTEMBER 9, 2004

9:45 a.m.	03-2440- 03-2446	Dane County Dept. of Human Services v. Ponn P.
10:45 a.m.	03-0097	Mared Industries, Inc. v. Alan Mansfield
1:30 p.m.	03-0226	Luann Gehin v. Wisconsin Group Insurance Board

FRIDAY, SEPTEMBER 10, 2004

9:45 a.m.	03-0689	Insurance Co. of North America v. Cease Electric, Inc., et al.
10:45 a.m.	02-1003	Bryan Baumeister, et al. v. Automated Products, Inc., et al.
1:30 p.m.	02-2961	Milwaukee Metro. Sewerage District v. City of Milwaukee

TUESDAY, SEPTEMBER 21, 2004

9:45 a.m.	03-0500	Hal Hempel v. City of Baraboo, et al.
10:45 a.m.	03-0417-CR	State v. Glenn H. Hale
1:30 p.m.	03-0610	John J. Petta, et al. v. ABC Ins. Co., et al.

WEDNESDAY, SEPTEMBER 22, 2004

9:45 a.m.	02-2837	Meriter Hospital, Inc. v. Dane County
10:45 a.m.	03-1086	Gene L. Olstad, et al. v. Microsoft Corporation, et al.
1:30 p.m.	03-1114	City of Pewaukee v. Thomas L. Carter

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following case:

03-2640-BA In the Matter of the Bar Admission of Samuel Mostkoff: Samuel Mostkoff v. Board of Bar Examiners

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321.

These brief summaries do not cover all of the issues that each of these cases presents. To read the briefs, visit the Wisconsin State Law Library in the Risser Justice Building on the Capitol Square. Synopses are a service of the Director of State Courts Office/Amanda Todd, Court Information Officer 608-264-6256.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 9, 2004
9:45 a.m.

03-2440-CR Dane County Dept. of Human Services v. Ponn P.
03-2446

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Dane County Circuit Court, Judge Daniel R. Moeser presiding.

In this case, the Wisconsin Supreme Court will decide whether a parent's rights to his seven children were properly terminated. In making this determination, the Court will decide if the law that permitted severing this parent-child relationship is constitutional.

Here is the background: In May 2002, Ponn P. was convicted of felony child abuse involving one of his seven children (who at that time ranged in age from 4-15) and sent to prison. Although there was only one conviction, evidence existed that he had abused all of his seven children; before the conviction, there was a court order in place prohibiting him from visiting the children. A social worker at the time testified that "[t]his case would fall at probably the highest level of abuse and neglect that I've ever … come across in my job."

After the conviction, the State began the process of terminating Ponn's parental rights. The State relied upon a law[1] that says a parent maybe be found to be unfit if a court has continually decided, over the course of a year, that the parent may not have contact with the children. After the parent is found to be unfit, the court determines whether a termination of parental rights (TPR) is in the best interest of the children. In this case, Ponn did not contest the TPR petition but did take the question of whether the law is constitutional – which the circuit court did not address – to the Court of Appeals.

Ponn's argument in the Court of Appeals (where he lost) and again in the Supreme Court is that the law is unconstitutional because it permits the government to sidestep its duty to prove that a parent is unfit. This occurs, he says, when a parent's rights are terminated based upon a past court order denying visitation – even though that past court order might not have been based upon a finding of unfitness.

The Court will decide whether Ponn's constitutional rights were violated when his parental rights were terminated.

[1] Wis. Stats. § 48.415(4)

.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 9, 2004
10:45 a.m.

03-0097 Mared Industries, Inc. v. Alan Mansfield

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed part of a Milwaukee County Circuit Court ruling, Judge Maxine A. White presiding.

In this case, the Wisconsin Supreme Court will determine whether a summons and complaint was properly served on an individual who was being sued.

Wisconsin law[2] sets out rules for serving legal documents. The law requires that the individual being sued be served personally unless diligent efforts to find that person are unsuccessful. In that situation, the summons may be left at the person's residence with a person who is at least 14 years old and who has been informed of the contents. If this substitute option is not possible, then the summons may be mailed and published in the newspaper.

Here is the background: Mared Industries, Inc., is a Wisconsin company that competes with Diamond Blade Warehouse in Illinois. The companies made an agreement in 1996 not to hire away each other's employees. Specifically, Diamond agreed not to hire any employee of Mared until six months after the employee had left Mared. In April 2002, Diamond allegedly poached Mark Gindlin, a former Mared employee, in violation of this agreement. Mared sued Diamond and Alan Mansfield, Diamond's owner.

Mared hired William Monsen, a professional process server, to serve a summons and complaint on Mansfield. Monsen arrived at the company's Illinois headquarters and asked for Mansfield, indicating that he had to serve Mansfield with legal papers. Mansfield did not appear; instead, Diamond employee Michael Levy approached Monsen and told him that he, Levy, was authorized to accept service of legal documents. Monsen eventually permitted Levy to sign for the documents.

Mansfield missed the deadline for filing an answer to the summons and complaint, and the Milwaukee County Circuit Court entered a default judgment in favor of Mared. Mansfield then made a motion to reopen the default judgment, arguing that the service of the documents had not been proper. The trial court granted this motion, and ultimately dismissed Mared's case.

The Court of Appeals reversed this decision, concluding that Mansfield was properly served because Monsen reasonably relied upon Levy's insistence that he was authorized to accept the documents.

Mansfield now has come to the Supreme Court, where he argues that the service of the documents was not valid and that the Court of Appeals interpretation of the law is "highly strained." The Supreme Court will determine whether Mansfield was adequately served with the summons and complaint.

[2] Wis. Stat. § 801.11

.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 9, 2004
1:30 p.m.

03-0226 Luann Gehin v. Wisconsin Group Insurance Board

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed an order of the Dane County Circuit Court, Judge Moria Krueger presiding.

In this case, the Wisconsin Supreme Court will clarify how much weight uncorroborated hearsay evidence carries in an administrative hearing.

Here is the background: Luann Gehin is a 60-year-old high-school dropout who began working at UW Hospital in 1986. In 1992, while performing her work duties as a housekeeper, she injured her back. Sixteen months later, she underwent surgery that included a bone graft and the insertion of six bolts and two rods into her back.

During this period, Gehin applied for disability income continuation insurance benefits. She was found eligible and began receiving the monthly benefits payments in 1993. In 1997, however, her surgeon completed a form for the insurance group on which he indicated that she was able to work full-time. Based upon this form, Gehin's disability payments were discontinued.

Gehin asked for reconsideration of this decision, and her surgeon ordered a Functional Capacity Evaluation. The physical therapist who supervised the evaluation concluded that Gehin did "not appear employable in her current condition." After this, she saw a different orthopedic surgeon who found that she "absolutely could not return to her former job as a housekeeper." The surgeon did say, however, that Gehin could work in a sedentary job that alternated sitting and standing and did not require lifting. Based upon this, the insurance group affirmed its earlier decision to discontinue her benefits.

Gehin appealed this decision and won. The circuit court found that the Wisconsin Group Insurance Board wrongly relied upon the forms filed by the three medical personnel in reaching its decision and should have taken testimony from medical experts.

The Board appealed, and the Court of Appeals reversed the circuit court. The Court of Appeals concluded that an uncorroborated medical report is satisfactory evidence in this type of case as long as the author of the report *could* have been subpoenaed to testify. Gehin's failure to subpoena those people, the Court of Appeals found, permitted the Board to rely solely upon their written reports.

In the Supreme Court, Gehin argues that the Court of Appeals' decision conflicts with law established in several cases that says uncorroborated hearsay does not suffice to support an agency's ruling.

The Supreme Court will determine whether Gehin will have another opportunity to make her case.

.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 10, 2004
9:45 a.m.

03-0689 Insurance Co. of North America v. Cease Electric, Inc., et al.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Walworth County Circuit Court, Judge John R. Race presiding.

In this case, the Wisconsin Supreme Court will decide whether the economic loss doctrine prevents an egg farm that lost 17,000 chickens from suing an electrician who allegedly botched the installation of a ventilation system.

The economic loss doctrine says that people who enter into a business arrangement and lose money cannot bring tort lawsuits against one another to recover the money. Torts are reserved for wrong acts or omissions that result in injuries that are more than economic. Economic losses are remedied instead through enforcement of the terms of the business contract. While it is clear under Wisconsin law that the economic loss doctrine applies in situations involving a product that fails, it is less clear if the doctrine applies in situations involving where service is negligent. The Supreme Court will clarify that issue in this case.

Here is the background: In the summer of 1996, Cold Spring Egg Farm, Inc., which raises chickens to produce eggs, decided to install a new ventilation system in one of its barns. Ventilation systems are required to bring fresh, cool air into the barns and are essential for the survival of the chickens.

Cold Spring purchased new fans for the system from Aerotech, Inc. The fans were hooked to a main regulator and designed to bring fresh air into the barn when the temperature rose to a certain level and to shut down when it cooled sufficiently. A back-up thermostat was to act as a safety device in the event that the primary regulator failed.

In summer 1996, Cold Spring hired Cease Electric to install the fan system. On Jan. 8, 1997, the primary and back-up systems failed and 17,000 chickens died.

When he discovered the failure, Cold Spring Manager Scott Hartwig called Carroll Electric, a Cease competitor, to fix the system. The Carroll electrician replaced the main fan control unit and the back-up thermostat. Hartwig later said he recalled the electrician leaving him the broken fan control but not the old thermostat. The whereabouts of the thermostat became key in this case.

Cold Spring hired Carroll Electric to investigate why the system failed. Carroll determined that the main fan control and the back-up thermostat had been improperly wired on the same circuit, so that if the breaker tripped, both would shut off. Carroll rewired the barn.

Cold Spring's insurer, Insurance Company of North America (INA) paid Cold Spring $118,339.20 for its loss of income and $40,704.89 for the loss of the chickens. Cold Spring still suffered a loss of nearly $40,000, the amount of its deductible. INA then began a subrogation action, seeking reimbursement from Cease and its insurance carrier.

Cease raised the issue of spoliation of evidence, arguing that, since Carroll had rewired the barn without documenting the problems he found and since the back-up thermostat was missing, Cold Spring and INA should not be allowed to proceed with testimony about the miswiring. The trial court denied this motion, noting that the lack of evidence was regrettable but that it did not rise to the level of spoliation. The trial court also determined that the economic loss doctrine did not bar Cold Springs' lawsuit, because the contract was for services rather than products.

A jury found in favor of Cold Spring and INA and a verdict for $204,065.29 was entered. Cease appealed, and the Court of Appeals affirmed but noted that the Supreme Court has not addressed the issue

.

of whether the economic loss doctrine bars recovery of damages in cases involving negligent performance of services. The Supreme Court will clarify whether the economic loss doctrine applies.

.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 10, 2004
10:45 a.m.

02-1003 Bryan Baumeister, et al. v. Automated Products, Inc., et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a ruling of the Dane County Circuit Court, Judge Richard J. Callaway presiding.

This case involves two construction workers who were injured while building a church in Marshall. The Wisconsin Supreme Court will clarify the circumstances under which an appeal may be labeled "frivolous".

Wisconsin law[3] defines a frivolous appeal as one that has no hope of success or one that is filed simply to harass the opposing party. When an appeal is found to be frivolous, the appellant may be ordered to pay the other side's court costs and fees, as well as attorney fees.

Here is the background: Bryan Baumeister and Jeffrey Brown were carpenters employed by Diamond Builders in the construction of the Holy Trinity Lutheran Church in Marshall. Diamond was a subcontractor hired by the general contractor, Roberts Construction. On Oct. 16, 1997, the two men were working 30-40' above the ground to erect trusses and construct the chapel roof. As they worked, the wood trusses collapsed, knocking them both to the concrete floor. Both were seriously injured.

General Casualty Co., Holy Trinity's insurer, sued Diamond Builders, alleging negligent installation of temporary bracing during the truss installation. Baumeister and Brown then sued the architect, Edward Solner, arguing that he had failed to "approve or design" safe temporary bracing for the trusses and that this failure caused their injuries. They argued that he should have been at the site to supervise the installation of the trusses.

The circuit court granted summary judgment in favor of Solner, dismissing the claims against him. The Court of Appeals affirmed this ruling, concluding that nothing in Solner's contract with Holy Trinity required the architect to supervise the installation or provide instructions for bracing the trusses. In fact, the Court of Appeals noted, the contract specified that the contractor would be responsible for construction "means, methods, techniques, sequences or procedures, [and] safety precautions…"

The Court of Appeals noted that, in order to have prevailed, the carpenters would have had to prove that Solner had a duty of care, that he breached that duty, and that this breach resulted in their injuries.

Solner asked the court to order Baumeister and Brown to pay his attorney fees under the frivolous appeal law. The majority – with Judge Paul Lundsten dissenting – declined to label the appeal frivolous.

Solner now has appealed to the Supreme Court, asking for clarification on what constitutes frivolousness. Baumeister and Brown also have appealed, arguing again that Solner had a duty to make certain that the trusses could be safely installed, and that a jury should have been permitted to hear the case:

> Please be aware that what this case is really about, after the dust clears, is two regular construction workers working high above the ground unsuspecting the harm which was about to befall them…Given the architect's superior knowledge and skill, particularly in comparison with ordinary construction workers, a jury could find he should have supplied the contractor and its employees with the necessary instructions on bracing.

---

[3] Wis. Stats. § 809.25(3)

.

The Supreme Court will decide whether Baumeister and Brown’s appeal was frivolous.

.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 10, 2004
1:30 p.m.

02-2961 Milwaukee Metro. Sewerage District v. City of Milwaukee

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a ruling of the Milwaukee County Circuit Court, Judge Mel Flanagan presiding.

This case arises from a lawsuit by the Milwaukee Metropolitan Sewerage District against the City of Milwaukee. The circuit court dismissed the claim but the Court of Appeals reinstated it.

Here is the background: Early on Dec. 9, 1999, a City of Milwaukee water main, located under the road near North 40th Street and West Bluemound, collapsed. Authorities were alerted by a resident who found water rushing into her basement.

Directly below and parallel to the water main, but 20 feet deeper, was a sewer line. The sewer also collapsed, and the Sewerage District contended that that cave-in was due to the water main collapse. The District based this theory on the statement of one of its employees, who claimed to have seen the sewer functioning 12 hours after the water main broke. This proved, the District said, that the water main collapsed first and eventually broke the sewer line.

The District sued the City to recoup the cost of rebuilding the sewer line. Its complaint alleged that the City was negligent in failing to properly maintain and operate the water main. The District hired an expert witness who filed a report giving an opinion that the water main had been leaking for at least the better part of a year, and possibly as long as two-and-a-half years. The District also noted that the broken water main, which was installed in 1926, was made of cast iron, a material no longer in use because of its tendency to break. The City acknowledged that this pipe had broken twice before in the same general vicinity.

The circuit court found in favor of the City, dismissing the District's claim. The judge noted that the City had not had any notice of an alleged defect in the water main, had not failed to fulfill any duty that it owed to the District, did not cause the District's damages, and was entitled to immunity against the District's negligence claim. Government entities have immunity from lawsuits in certain circumstances so that they can function without constant threat of litigation.

The District appealed, focusing in particular on an argument that the City created a nuisance by permitting an allegedly faulty water main to continue in operation. The Court of Appeals agreed, reinstating the District's lawsuit.

In the Supreme Court, the City argues that the Court of Appeals opinion – if it is allowed to stand – will have serious financial consequences because it opens municipalities across the state to lawsuits based on nuisance claims. The City calls the Court of Appeals opinion "novel and astonishing" and argues that the District is not even permitted to file a nuisance claim because it is a government entity and not a landowner.

The Supreme Court will decide whether the District's lawsuit against the City may proceed.

.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 21, 2004
9:45 a.m.

03-0500 Hal Hempel v. City of Baraboo, et al.

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a ruling of the Sauk County Circuit Court, Judge Patrick Taggart presiding.

In this case, the Wisconsin Supreme Court will decide whether a public employer who receives an open-records request may withhold documents created during investigation of a sexual harassment complaint in order to protect the privacy of the alleged victim and the witnesses.

Here is the background: In January 2000, Captain Dennis Kluge of the City of Baraboo Police Department told Officer Hal Hempel that Officer Kaye Howver had accused Hempel of harassment. Kluge gave Hempel a copy of the Howver's complaint and invited him to respond. Hempel gave verbal responses to Kluge's questions about the complaint in an interview. These responses were recorded.

The following August, Police Chief Thomas Lobe gave Hempel a memo detailing the results of the investigation. No discipline was imposed on Hempel, but he was told that a copy of the memo would be retained in his personnel file for three years and that Howver's complaint against him would be reconsidered in the event that any other complaint of a similar nature was received.

Hempel asked for copies of all documents – including interviews with witnesses – that were created in the investigation. Lobe denied his request before retiring in January 2001. Kluge became chief and decided to release certain records to Hempel but in redacted form (with names blacked out). Kluge's reasons for denying full access to the documents included a concern that witnesses might not cooperate in investigations if they know that their names and the information they provide will be released. The witnesses in this case had been promised that their responses would be kept confidential.

Hempel sued the City of Baraboo, the Baraboo Police Department, Sauk County, and the Sauk County Sheriff's Department alleging that they had violated the Open Records Law by withholding the requested documents. He lost in the circuit court and in the Court of Appeals.

The Court of Appeals majority noted that Wisconsin law emphasizes access to government documents, but that these decisions must be made on a case-by-case basis weighing public access against privacy concerns. The majority found that the circuit court balanced these conflicting interests appropriately and reached a reasonable result. Writing for the majority, Judge Paul Higginbotham noted:

The public's right to access public records must give way to the important public policy of encouraging victims and witnesses of employment discrimination to cooperate in internal investigations of such conduct.

Judge Charles P. Dykman, however, dissented, writing:

This is not an exceptional case. In fact, it is a mine-run case, in which a police department doesn't want to reveal evidence of sex discrimination going on within the department, or what steps the department has taken to insure that the policy of Wisconsin's anti-discrimination statute is being followed. That is understandable. Government does not like to be embarrassed by its mistakes, and secrecy can hide those mistakes from public scrutiny. The open records law, however, is designed to make this sort of information public.

The Supreme Court will decide whether documents created during a public employer's investigation of a harassment allegation may be insulated from public view in situations where interviewees have been promised confidentiality.

.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 21, 2004
10:45 a.m.

03-0417-CR State v. Glenn H. Hale

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Kenosha County Circuit Court, Judge David M. Bastianelli presiding.

This case involves a question of whether testimony from a witness at one trial may be used against a different defendant at a separate trial – a defendant who has never had an opportunity to cross-examine the witness – if both trials stem from the same crime and if the witness is unavailable to testify at the second trial.

Here is the background: In January 2002, Glenn H. Hale was charged with two counts of first-degree intentional homicide, party to a crime; three counts of conspiracy to commit armed robbery; and one count of possession of a firearm by a felon. The charges arose from a December 2001 incident in which two men – whom witnesses identified as Hale and Robert L. Jones – pushed their way into an apartment, demanded that the occupants give them marijuana, and then shot and killed two of the occupants.

Jones' trial was held first. At that trial, David Sullivan, a longtime friend of Hale, testified about having given a gun to Hale at the apartment that Hale shared with Jones before the murders. Hale was not present for Jones' trial and never had an opportunity to cross-examine Sullivan.

Jones was convicted and Hale's trial began but the State was unable to locate Sullivan to testify against Hale. The court allowed the prosecutor to use Sullivan's testimony from the Jones trial. That testimony, combined with the testimony of live witnesses and various other evidence, led the jury to convict Hale.

Hale appealed, arguing that his constitutional right to confront his accuser was violated when Sullivan's testimony from the previous trial was allowed into evidence. The Court of Appeals upheld Hale's conviction but did so with reservations. That court expressed that it had doubts about the correctness of this conclusion and indicated that it was constrained by a recent opinion from the Court of Appeals, District III[4] (headquartered in Wausau).

At issue is whether Sullivan's testimony at the prior trial falls into the "hearsay exception" to the Confrontation Clause. The hearsay exception permits the admission of former testimony into evidence only under very specific conditions. The witness must be unavailable (which he was, in this case) and the evidence must be determined to be so reliable and trustworthy that cross-examination of the witness who provided it would add very little. Hale argues that Sullivan's testimony does not fall into the hearsay exception.

The Supreme Court will determine whether Wisconsin will allow prosecutors to introduce testimony against criminal defendants in these circumstances.

[4] State v. Bintz, 2002 WI App 204, 257 Wis. 2d 177, 650 N.W.2d 913
.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 21, 2004
1:30 p.m.

03-0610 John J. Petta, et al. v. ABC Ins. Co., et al.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an order of the Sawyer County Circuit Court, Judge Norman L. Yackel presiding.

In this case, the Wisconsin Supreme Court will decide whether plaintiffs in a wrongful death case who have received an amount from the wrongdoers that is inadequate to cover their damages may bar the deceased person's insurer from filing a subrogation claim.

Here is the background: Dayle L. Petta was killed in a head-on automobile accident on Nov. 14, 2001. Bryon L. Schroeder caused the crash by crossing the centerline.

Petta's two adult children sued Schroeder and Whiplash Lake Resort, Inc., the owner of the vehicle that Schroeder had been driving. They also sued West Bend Mutual Insurance Company, which insured both Schroeder and Whiplash, and Travco Insurance Company, Petta's insurer, which had a subrogation interest in any amount that Petta's children might collect. Travco filed its own claim against West Bend for $14,000.

Petta's children settled with West Bend for the full amount of available coverage, $280,000. This amount did not make them whole; that is, it was not enough to cover all of the injuries they suffered. The children then went to court seeking an order that would bar Travco from tapping into that money. Travco opposed this, arguing that the "made whole doctrine" articulated by the Wisconsin Supreme Court in a 1982 case[5] does not apply in this case because the children were not the ones insured by Travco.

Travco lost in the circuit court and appealed to the Court of Appeals. The Court of Appeals reversed the circuit court, concluding that the settlement procedure that permits an insurer's subrogation rights to be extinguished in situations where the injured parties have not been made whole does not apply in wrongful death cases.

The Supreme Court will determine whether plaintiffs who have not been made whole in a wrongful death case may bar an insurer's subrogation claim.

[5] Rimes v. State Farm Mutual Auto. Ins. Co., 106 Wis. 2d 263, 316 N.W.2d 348 (1982)
.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 22, 2004
9:45 a.m.

02-2837 Meriter Hospital, Inc. v. Dane County

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a ruling of the Dane County Circuit Court, Judge Gerald C. Nichol presiding.

This case involves an individual who was a prisoner when he was brought to Meriter Hospital in Madison but became a free man when the charges against him were dropped during his lengthy hospital stay. The Wisconsin Supreme Court will decide who pays the medical bills in this situation.

Several entities that have an interest in the outcome of this case – including the Wisconsin Counties Association, the Wisconsin Hospital Association, and the Badger State Sheriffs Association – have filed "friend of the court" (amicus) briefs.

Here is the background: In October 1998, Michael Gibson was booked into the Dane County Jail on charges of resisting an officer and violating his parole. In December, he became gravely ill and was taken to Meriter Hospital where he was found to be in a state of septic shock caused by a bacterial infection. He soon slipped into a coma and suffered sequential organ failure. Without treatment, all parties agreed, he would have died within 24 hours. Meriter characterized the treatment that Gibson received from the jail nurse when he first became ill as "marginal."

Gibson stayed at the hospital for 34 days, amassing medical bills of $187,569. Soon after his admission, the sheriff notified the prosecutor of Gibson's condition and the prosecutor made successful motion to dismiss the charges that were pending. Three days into his hospital stay, Gibson became a free man.

State law[6] requires the county to pick up the tab for prisoners' medical care if the prisoner cannot pay the bill. Gibson is indigent. Meriter sent its bill to Dane County, which authorized a $4,100 payment. The county indicates that this is the maximum amount it is required to pay under a formula developed by the state for indigent prisoners, and that it is only liable for three days of the 34-day hospital stay, because Gibson was released from custody after three days.

Meriter sued Dane County, arguing that the county's liability for a prisoner's medical bills begins when the prisoner is admitted and continues until discharge regardless of whether the charges are dropped. Meriter believes Dane County only released Gibson from custody to avoid paying his medical bills.

Meriter lost in the trial court and in the Court of Appeals. Both of those courts agreed that a county is only liable for a prisoner's medical bills during the time when the individual is in county custody. However, the lower courts also declared that counties must pay the same rate for indigent inmates as they pay for private citizens who are eligible for medical assistance. This results in higher payments by the counties and this is the reason that Dane County also has appealed.

In the Supreme Court, Meriter argues that the responsibility to pay for an indigent prisoner's medical care should fall upon the county even if the county takes steps during the hospital stay to release the prisoner from custody. Dane County, on the other hand, argues that it paid what the law required, that it has never paid more than the $4,100 maximum discharge rate designated by the state's fiscal agent, and that Meriter had always, until the Gibson case, accepted that rate.

The Court will determine whether the hospital or the county must pay, and will clarify how the rate is to be calculated.

---

[6] Wis. Stats. 302.38

.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 22, 2004
10:45 a.m.

03-1086 Gene L. Olstad, et al. v. Microsoft Corporation, et al.

This is a certification from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Milwaukee County Circuit Court, Judge Jeffrey A. Kremers presiding.

This is a class-action lawsuit against Microsoft Corp. The Supreme Court will decide whether Wisconsin's antitrust statute[7] applies to interstate commerce.

Here is the background: Gene Olstad, on behalf of "All Others Similarly Situated," filed a lawsuit against Microsoft alleging that the company engaged in a nationwide course of anti-competitive conduct in order to build a monopoly that allowed it to overcharge consumers of its operating systems and certain software.

Olstad's action was premised on the findings of the federal district court for the District of Columbia, which concluded in 2000 that Microsoft had violated law by building a monopoly on operating systems designed to run on Intel-comparable personal computers. The federal court also found that Microsoft had monopolized the Web browser market by unlawfully tying Microsoft Explorer to its operating systems.

Since the federal court determined that Microsoft had engaged in illegal conduct, Olstad says, he brought this class-action lawsuit in Wisconsin in order to help Wisconsin consumers recover damages that they suffered as a result of that conduct.

Arguing that Wisconsin's antitrust law does not apply to out-of-state conduct, and further pointing out that it was not established under Wisconsin law and is not headquartered in Wisconsin, Microsoft asked the circuit court to dismiss the case. Microsoft's argument relies upon a 1914 Wisconsin Supreme Court case[8] that said the state's antitrust statute applies only to intrastate commerce.

The circuit court agreed with Microsoft and dismissed the case. The judge concluded that Wisconsin's antitrust law does not apply to commerce that extends beyond the state's borders and also that Olstad had not shown that he had suffered any damages and therefore was not an adequate class representative.

Olstad appealed, and the Court of Appeals certified this case to the Supreme Court, noting that the Wisconsin Legislature re-wrote the antitrust statute in 1980, and that the law may now be subject to a more broad interpretation than it was 90 years ago.

In the Supreme Court, Olstad contends – and the State of Wisconsin, in an *amicus* brief, agrees – that the Wisconsin statute applies to interstate commerce if it has a direct, substantial, and reasonably foreseeable effect on commerce within Wisconsin.

The Court will decide whether this class-action lawsuit on behalf of Wisconsin consumers will be allowed to proceed.

---

[7] Wis. Stat. 133.03

[8] Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058 (1914)

.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 22, 2004
1:30 p.m.

03-1114 City of Pewaukee v. Thomas L. Carter

This is a review of a split decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Waukesha County Circuit Court, Judge Mark Gempeler presiding.

In this case, the Wisconsin Supreme Court will clarify the circumstances under which an individual who has had a trial in municipal court may receive a new trial in the circuit court.

In Wisconsin, there are about 225 municipal courts, most of which operate part-time and handle matters such as truancy, ordinance violations, and traffic tickets. A party who loses in municipal court may appeal the decision to the circuit court, and the circuit court judge will either review the record or – if either party requests it – hold a new trial.

Here is the background: Thomas L. Carter was arrested for operating a motor vehicle while intoxicated (OWI). A trial was held in Waukesha Municipal Court in June 2002. During the trial, one of the officers who had been at the scene of the accident that Carter allegedly caused could not identify Carter. The officer wrongly pointed out Carter's brother in court. Then, the prosecutor told the judge that the arresting officer would not be available to testify. This meant that the prosecution would have no foundation for admitting the results of the blood test into evidence. The prosecutor nevertheless told the judge he wanted to proceed on the evidence he had presented, and then rested the City's case.

Carter's attorney made a motion to dismiss the case on the grounds that the City had failed to meet its burden of proof. The judge granted the motion and the City appealed to the circuit court for a new trial.

The circuit court denied the City a new trial, finding that the law requires a case to be fully litigated in the municipal court before a new trial is sought in the circuit court. The judge concluded that, because the case was dismissed halfway through, it was not fully litigated. The City appealed, and the Court of Appeals – in a split decision – affirmed the circuit court.

The Court of Appeals' majority concluded that "fully litigated" means each side has presented its arguments and/or rested its case

In the Supreme Court, the City argues that the Court of Appeals effectively revokes a municipality's option to appeal to the circuit court in situations where the defendant does not present a case, and then makes a successful motion to dismiss.

The Supreme Court will decide whether the City was properly barred from receiving a new trial in the circuit court.

.